UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

ANDRE L. MURPHY, SR., Petitioner, v. D.L. RUNNELS, Warden, Respondent.	1:05-cv-00186-AWI-TAG HC REPORT AND RECOMMENDATION TO GRANT RESPONDENT'S MOTION TO DISMISS (Doc. 12)

PROCEDURAL HISTORY

Petitioner is a state prisoner proceeding pro se with a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254.

On September 30, 1999, Petitioner was convicted of assault by means of force likely to produce great bodily injury, a violation of California Penal Code § 245(a)(1). The jury found true an allegation that Petitioner had personally inflicted great bodily injury under circumstances involving domestic violence, in violation of Penal Code § 12022.7. The trial court found that Petitioner had suffered two prior serious felony convictions within the meaning of Penal Code § 667, subdivision (a). Petitioner was sentenced to serve an indeterminate prison sentence of twenty-five years to life, plus a consecutive determinate term of fourteen years on the enhancements. (See Lodged Documents ("LD"), Doc. 1).

Petitioner appealed his conviction and sentence to the California Court of Appeal, Fifth Appellate District ("5th DCA"), which affirmed the judgment on October 17, 2000. (LD, Doc. 2). Petitioner did not thereafter file a petition for review in the California Supreme Court.

During the pendency of his appeal in the 5th DCA, Petitioner filed two petitions for collateral review in the California state courts. On May 2, 2000, in Fresno County Superior Court case number 651225-5, Petitioner sought habeas relief that was denied as "not warranted while petitioner's appeal is pending before the Fifth District Court of Appeal." (LD, Doc. 3). On August 18, 2000, Petitioner filed a habeas petition in the 5th DCA, claiming only that the respondent in his pending appeal had not yet filed a Reply Brief "nor showed any just cause thereof." (LD, Doc. 4, p. 3). In his Proof of Service by Mail, Petitioner labeled the habeas petition, which was filed on a pre-printed habeas corpus petition form, as a "Request for Motion for Default." (Id. at p. 7). The 5th DCA denied this petition in the opinion affirming his conviction on October 17, 2000. (LD, Docs. 2, 4).[1]

On January 17, 2002, Petitioner filed a federal petition in this Court, case number 1:02-cv-05079-AWI-SMS, raising claims of ineffective assistance of trial and appellate counsel, improprieties in jury selection, and challenges to his Three Strikes' sentence. (Case No. 1:02-cv-05079-AWI-SMS, Doc. 1). On May 10, 2002, the Magistrate Judge issued Findings and Recommendations to dismiss the petition because it contained unexhausted claims. (Id., Doc. 6). On June 26, 2002, the District Court adopted the Magistrate Judge's Findings and Recommendations and entered judgment dismissing the petition without prejudice. (Id., Doc. 8).

On March 21, 2003, Petitioner filed his third and final state habeas petition--and his first *post-conviction* petition--in the California Supreme Court in case number S114475. (LD, Doc. 5). On November 12, 2003, the California Supreme Court denied the petition without comment. (LD, Doc. 6). The instant federal petition for writ of habeas corpus was filed on February 9, 2005. (Doc. 1.)

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[1]In his direct appeal, Petitioner's appellate counsel had filed a brief pursuant to People v. Wende, 25 Cal.3d 436 (1979), contending that she could find no viable appellate issues and requesting that the 5th DCA independently review the record for any such errors. (LD, Doc. 2, p. 2). In denying Petitioner's habeas petition, the 5th DCA noted that Petitioner's grounds for the petition appeared to be that Respondent was subject to default because he had not filed a "Reply" brief. (Id. at p. 11). As the 5th DCA pointed out, Respondent was not required to file such a brief under California Rules of Court, nor, as a practical matter would it have made sense to do so since Petitioner's own counsel had not identified any appellate issues to raise in the 5th DCA.

DISCUSSION

A. Procedural Grounds for Motion to Dismiss

On June 14, 2005, Petitioner filed an amended petition. (Doc. 8). On December 27, 2005, the Court ordered Respondent to file an answer. (Doc. 9). On February 24, 2006, Respondent filed the instant Motion to Dismiss the petition as being filed outside the one-year limitations period prescribed by 28 U.S.C. § 2244(d)(1). (Doc. 12). Rule 4 of the Rules Governing Section 2254 Cases allows a district court to dismiss a petition if it "plainly appears from the face of the petition and any exhibits annexed to it that the petitioner is not entitled to relief in the district court . . . ." Rule 4 of the Rules Governing Section 2254 Cases.

The Ninth Circuit has allowed respondents to file a motion to dismiss in lieu of an answer if the motion attacks the pleadings for failing to exhaust state remedies or being in violation of the state's procedural rules. See, e.g., O'Bremski v. Maass, 915 F.2d 418, 420 (9th Cir. 1990) (using Rule 4 to evaluate motion to dismiss petition for failure to exhaust state remedies); White v. Lewis, 874 F.2d 599, 602-603 (9th Cir. 1989) (using Rule 4 as procedural grounds to review motion to dismiss for state procedural default); Hillery v. Pulley, 533 F.Supp. 1189, 1194 & n.12 (E.D. Cal. 1982) (same). Thus, a respondent can file a motion to dismiss after the Court orders a response, and the Court should use Rule 4 standards to review the motion. See Hillery, 533 F. Supp. at 1194 & n. 12.

In this case, Respondent's Motion to Dismiss is based on a violation of 28 U.S.C. 2244(d)(1)'s one-year limitation period. Because Respondent's Motion to Dismiss is similar in procedural standing to a motion to dismiss for failure to exhaust state remedies or for state procedural default and Respondent has not yet filed a formal answer, the Court will review Respondent's Motion to Dismiss pursuant to its authority under Rule 4.

B. Limitation Period for Filing a Petition for Writ of Habeas Corpus

On April 24, 1996, Congress enacted the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). The AEDPA imposes various requirements on all petitions for writ of habeas corpus filed after the date of its enactment. Lindh v. Murphy, 521 U.S. 320, 117 S.Ct. 2059 (1997); Jeffries v. Wood, 114 F.3d 1484, 1499-1500 (9th Cir. 1997) ("justice and judicial economy are better

served by applying the Act to cases filed after the enactment date"), overruled on other grounds by Lindh v. Murphy, 521 U.S. 320, 117 S.Ct. 2059 (1997). The instant petition was filed on February 9, 2005, and thus, it is subject to the provisions of the AEDPA.

The AEDPA imposes a one-year period of limitation on petitioners seeking to file a federal petition for writ of habeas corpus. 28 U.S.C. § 2244(d)(1). As amended, § 2244, subdivision (d) reads:

> (1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of –
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> (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
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> (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
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> (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review; or
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> (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.
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> (2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

28 U.S.C. § 2244(d).

In most cases, the limitation period begins running on the date that the petitioner's direct review became final. Here, Petitioner was convicted on September 30, 1999, and timely filed his notice of appeal in the 5th DCA. The California Court of Appeal affirmed Petitioner's conviction on October 17, 2000. Petitioner did not file a petition for review in the California Supreme Court. In California, if a petitioner does not seek review of the intermediate state appellate court decision, a conviction becomes final forty days after the California Court of Appeal files its opinion. See Cal. Rules of Court, rules 24(a), 28(b), 45(a); Cal. Civ. Proc. Code, sec. 12a; Smith v. Duncan, 297 F.3d 809, 813 (9th Cir. 2002). There is no tolling pending issuance of the remittitur. Wixom v. Washington, 264 F.3d 894, 897 (9th Cir. 2001)(tolling does not continue until issuance of the

mandate under Washington law because the mandate is not a decision terminating review); White v. Klitzkie, 281 F.3d 920, 924, n. 4 (9th Cir. 2002)(entry of mandate under Guam law does not extend tolling); accord Roberts v. Cockrell, 319 F.3d 690 (5th Cir. 2003)(finality occurs with expiration of time for seeking further direct review and not later issuance of mandate). Moreover, the ninety-day time period normally tolled for filing a petition for writ of certiorari in the United States Supreme Court is not available if the petitioner fails to seek review on direct appeal to the California Supreme Court. See Smith v. Duncan, 297 F.3d at 813.

As mentioned, the 5th DCA issued its opinion on October 17, 2000. Petitioner was entitled to an additional forty days until the decision became final on November 26, 2000. Under the AEDPA, the one-year period commenced the following day, on November 27, 2000, and Petitioner had one year thereafter, or until November 27, 2001, within which to file his federal petition. The instant petition was not filed until February 9, 2005, over three years after the one-year limitation period had expired. Thus, absent applicable statutory or equitable tolling, the petition is untimely and must be dismissed.

C. Statutory Tolling of the Limitation Period Pursuant to 28 U.S.C. § 2244(d)(2)

Title 28 U.S.C. § 2244(d)(2) states that the "time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward" the one year limitation period. 28 U.S.C. § 2244(d)(2). In Nino v. Galaza, the Ninth Circuit held that the "statute of limitations is tolled from the time the first state habeas petition is filed until the California Supreme Court rejects the petitioner's final collateral challenge."[2] Nino v. Galaza, 183 F.3d 1003, 1006 (9th Cir. 1999); see also Taylor v. Lee, 186 F.3d 557 (4th Cir. 1999); Barnett v. Lemaster, 167 F.3d 1321, 1323 (10th Cir. 1999). The Ninth Circuit reasoned that tolling the limitations period during the time a petitioner is preparing his petition to file

[2]In California, the Supreme Court, intermediate Courts of Appeal, and Superior Courts all have original habeas corpus jurisdiction. See Nino 183 F.3d at 1006, n. 2 (9th Cir. 1999). Although a Superior Court order denying habeas corpus relief is non-appealable, a state prisoner may file a new habeas corpus petition in the Court of Appeal. Id. If the Court of Appeal denies relief, the petitioner may seek review in the California Supreme Court by way of a petition for review, or may instead file an original habeas petition in the Supreme Court. See, id.

at the next appellate level reinforces the need to present all claims to the state courts first and will prevent the premature filing of federal petitions out of concern that the limitation period will end before all claims can be presented to the state supreme court. Nino, 183 F.3d at 1005. However, the limitations period is not tolled for the time such an application is pending in federal court. Duncan v. Walker, 533 U.S. 167, 181, 121 S.Ct. 2120 (2001).

Petitioner's first and second state habeas petitions, filed respectively in Fresno County Superior Court and the 5th DCA, were *both* filed and denied *before the one-year period of limitations had commenced* on November 27, 2000. Since the one-year period would not even commence until Petitioner's appeal became final, see 28 U.S.C. § 2244(d)(1), Petitioner's two collateral actions that were filed and terminated *prior to* the commencement of the limitations period could have no tolling consequences. Put another way, the first two state petitions could not toll a limitations period that had not started to run.

By contrast, the third state petition, filed on March 21, 2003, two years and five months after Petitioner's conviction became final, was filed *after* the one-year period had already expired. Thus, it too had no tolling effect. Green v. White, 223 F.3d 1001, 1003 (9th Cir.2000) (Petitioner is not entitled to tolling where the limitations period has already run prior to filing state habeas proceedings); see Webster v. Moore, 199 F.3d 1256, 1259 (11th Cir.2000)(same); Jackson v. Dormire, 180 F.3d 919, 920 (9th Cir. 1999)(petitioner fails to exhaust claims raised in state habeas corpus filed after expiration of the one-year limitations period).

Even had the limitations period not already expired, however, Petitioner's last state petition was untimely and was not entitled to statutory tolling. A delay of almost two and one-half years cannot be justified as "timely" under Nino, 183 F.3d 1003, and Evans v. Chavis, ___U.S.___, 126 S.Ct. 846 (2006). As explained previously, in Nino, the Ninth Circuit held that the statutory tolling commences upon the filing of the first state habeas petition after the judgment becomes final until the final collateral challenge is denied. Nino, 183 F.3d at 1006. The one-year limitations period continues to run, however, from the time the judgment becomes final until the filing of the first post-conviction state habeas petition. Id. at 1006, 1007. Thus, the one-year period expired on November 27, 2001, one year and five months *before* Petitioner would have been entitled to statutory tolling by

virtue of his filing a state habeas petition in the California Supreme Court. Id.

Moreover, Petitioner's unexcused delay in filing his lone post-conviction state habeas petition precludes that petition from being entitled to statutory tolling because it was not "properly filed" under the AEDPA. In Carey v. Saffold, 536 U.S. 214, 122 S.Ct. 2134 (2002), the Supreme Court, addressing a four and one-half month delay between a state court of appeal denial of a habeas petition and the filing of a petition in the California Supreme Court, rejected the Ninth Circuit's reliance on language in the state supreme court's ruling as a "bellwether" that the state court's denial had addressed the merits, thus implicitly indicating that the was petition timely:

> "Given the variety of reasons why the California Supreme Court may have included the words 'on the merits,' those words cannot by themselves indicate that the petition was timely. And the Ninth Circuit's apparent willingness to take such words as an absolute bellwether risks the tolling of the federal limitations period even when it is highly likely that the prisoner failed to seek timely review in the state appellate courts.... The Ninth Circuit's rule consequently threatens to undermine the statutory purpose of encouraging prompt filings in federal court in order to protect the federal system from being forced to hear stale claims."

Saffold, 536 U.S. at 226. (Citations omitted.) The Supreme Court emphasized that only a "timely" appeal tolls AEDPA's statute of limitations period, and that "unreasonable" delays are not "timely." Saffold, 536 U.S. at 214.

The Supreme Court recently clarified its view of unreasonable state court delays in Evans v. Chavis, 126 S.Ct. 846, holding that, when the state court denies the habeas petition without any explanation or indication as to timeliness, federal district courts must conduct their own inquiries regarding whether the state habeas petitions were filed within a "reasonable" time. By contrast, where there is a "clear indication that a particular request for appellate review was timely or untimely," there is no need to conduct such an independent examination. Evans, 126 S.Ct. at 852.

Here, the California Supreme Court denied Petitioner's state petition without comment; thus, this Court must conduct its own inquiry into whether the petition was timely. From the undisputed facts discussed above, it is patent that Petitioner's two and one-half year delay in filing his first

post-conviction habeas petition in the California Supreme Court was excessive and unreasonable. Given the United States Supreme Court's holdings in Evans and Carey, the Court must find that the last state court habeas petition, filed over two years after Petitioner's conviction became final, was not "properly filed" within the meaning of the AEDPA and thus is not entitled to statutory tolling. See Evans, 126 S.Ct. at 848; Carey, 536 U.S. at 222-223.

Finally, *even if* the limitations period had not already expired before the last state petition was filed, and *even if* the last state petition had been entitled to statutory tolling during its pendency, Petitioner *still* waited another fifteen months after that petition was denied before filing the instant petition. Thus, even assuming, arguendo, that the last state petition was "properly filed" and thus entitled to statutory tolling under Evans, the one-year limitations period nevertheless expired *after* the California Supreme Court denied the state habeas petition and *before* the instant petition was filed.

By the Court's calculations, Petitioner is untimely by a minimum of two years and eight months (excluding the time during which his last state petition was pending), and by a maximum of three years and four months (including the time during which the last petition was pending). Unless Petitioner is entitled to equitable tolling, therefore, the instant petition must be dismissed as untimely.

D. Equitable Tolling

The limitations period is subject to equitable tolling if "extraordinary circumstances beyond a prisoner's control" have made it impossible for the petition to be filed on time. Spitsyn v. Moore, 345 F.3d 796, 799 (9th Cir. 2003)(internal quotation marks and citations omitted); Calderon v. United States District Court (Beeler), 128 F.3d 1283, 1288 (9th Cir. 1997), overruled on other grounds by Calderon v. U.S. Dist. Ct. (Kelly), 163 F.3d 530, 541 (9th Cir. 1998), itself abrogated on

other grounds by Woodford v. Garceau, 538 U.S. 202, 123 S.Ct. 1398 (2003)(noting that "[e]quitable tolling will not be available in most cases, as extensions of time will only be granted if 'extraordinary circumstances' beyond a prisoner's control make it impossible to file a petition on time"). "When external forces, rather than a petitioner's lack of diligence, account for the failure to file a timely claim, equitable tolling of the statute of limitations may be appropriate." Lott v. Mueller, 304 F.3d 918, 922 (9th Cir. 2002) (quoting Miles v. Prunty, 187 F.3d 1104, 1107 (9th Cir. 1999)).

In order to establish equitable tolling, a prisoner must demonstrate that "extraordinary circumstances beyond [his] control" made it "impossible to file a petition on time." (Beeler), 128 F.3d at 1288. In Allen v. Lewis, 255 F.3d 798, 801 (9th Cir. 2001), the Ninth Circuit concluded that a petitioner "must show that the 'extraordinary circumstances' were the but-for and proximate cause of his untimeliness." The Ninth Circuit reaffirmed this rule in Espinoza-Matthews v. California, 432 F.3d 1021, 1026 (9th Cir. 2005), noting that the determination vis-a-vis equitable tolling is "highly fact-dependent" and that a petitioner "bears the burden of showing that equitable tolling is appropriate." Id. The Ninth Circuit also noted the United States Supreme Court's decision in Pace v. DiGuglielmo, 544 U.S.408, 418, 125 S.Ct. 1807 (2005), which framed the equitable tolling standard "in less absolute terms":

> "Generally, a litigant seeking equitable tolling bears the burden of establishing two elements: (1) that he has been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way."

Espinoza-Matthews, 432 F.3d at 1026, n. 5, quoting Pace, 125 S.Ct. at 418. The Ninth Circuit declined to decide whether Pace had "lowered the bar somewhat" because the Ninth Circuit concluded that petitioner had met the "more demanding" articulation found in the Ninth Circuit case law. Espinoza-Matthews, 432 F.3d at 1027.

Here, Petitioner maintains that he is entitled to a total of approximately thirty-four months of equitable tolling. (Doc. 15, pp. 3-4). Petitioner bases this conclusion on his assertions that "28-30" months were tolled between October 17, 2000 and November 12, 2003 for pendency of his state and federal habeas petitions, transfers to other prisons, lockdowns, and lack of access to the prison library; 31 days were tolled as a result of an "orientation" period after his transfer on an undisclosed date to High Desert State Prison; and 98 days were tolled between September 8, 2004 and December 17, 2004 due to another prison lockdown. (Id.).

Contrary to Petitioner's claims, however, he is not entitled to equitable tolling for prison lockdowns. In general, unpredictable lockdowns or library closures do not constitute extraordinary circumstances warranting equitable tolling. See United States v. Van Poyck, 980 F.Supp. 1108, 1111 (C.D. Cal.1997) (inability to secure copies of transcripts from court reporters and lockdowns at prison lasting several days and allegedly eliminating access to law library were not "extraordinary circumstances" and did not equitably toll one-year statute of limitations).

As in Van Poyck, Petitioner here has failed to demonstrate that the lockdowns he experienced, and the resulting limited law library access, substantially interfered with the entire year Petitioner had to file his federal petition. Petitioner's indigent status, his limited legal knowledge, and the difficulties and disruptions he encountered as a result of intermittent prison lockdowns are conditions of prison life that are no different than those experienced by the vast majority of incarcerated prisoners attempting to file petitions for writ of habeas corpus. By definition, therefore, such circumstances, in themselves, are not "extraordinary" and do not justify equitable tolling. See Van Poyck, 980 F.Supp. at 1111 (brief security lockdowns cannot be characterized as "extraordinary circumstances").

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Petitioner articulates no specific prejudice that inured uniquely to him as a result of the prison's lockdown policies nor does he establish a "but-for" causative relationship between the unspecified periods he claims to have been under lockdown and his failure to file this petition in a timely manner. Thus, Petitioner has not met his burden of showing "extraordinary circumstances" entitling him to equitable tolling of the limitations period on this basis. See Van Poyck, 980 F.Supp. at 1111; see also Galaz v. Harrison, 2006 WL 768813, *5 (E.D. Cal. Mar. 27, 2006)(38 day delay due to prison lockdown not entitled to equitable tolling); Chavez v. Henry, 2006 WL 1875442, *6 (E.D. Cal. July 3, 2006)(sporadic lockdowns not entitled to equitable tolling); Potts v. Giurbino, 2006 WL 1377105, *5 (E.D. Cal. May 18, 2006)(unpredictable lockdowns and library closures do not constitute extraordinary circumstances warranting equitable tolling); Atkins v. Harris, 1999 WL 13719, *2 (N.D.Cal. Jan.7, 1999) ("lockdowns, restricted library access and transfers do not constitute extraordinary circumstances sufficient to equitably toll the [AEDPA] statute of limitations. Prisoners familiar with the routine restrictions of prison life must take such matters into account when calculating when to file a federal [habeas] petition.... Petitioner's alleged lack of legal sophistication also does not excuse the delay."); Giraldes v. Ramirez-Palmer, 1998 WL 775085, *2 (N. D.Cal.1998) (holding that prison lockdowns do not constitute extraordinary circumstances warranting equitable tolling).

Nor is Petitioner entitled to tolling during the pendency of his first federal petition. The limitations period is not tolled for the time such an application is pending in federal court. Duncan v. Walker, 533 U.S. at 181-182.

Finally, Petitioner is not entitled to tolling for disruptions caused by transfers between prisons and any subsequent lack of access to his files. In Lott, the Ninth Circuit concluded that, if established, denying a petitioner access to his legal files during two temporary transfers that lasted

eighty-two days would "appear to satisfy the 'extraordinary circumstances' requirement for equitable tolling." Lott, 304 F.3d at 924. In so holding, the Court noted that a "temporary deprivation of an inmate's legal materials does not, in all cases, rise to a constitutional deprivation." 304 F.3d at 925 (quoting Vigliotto v. Terry, 873 F.2d 1201, 1202-1203 (9th Cir. 1989)(a three day deprivation does not rise to constitutional proportions).

In contrast to Lott, Petitioner has not alleged any actual deprivation of access to his files; rather, he has simply contended that the "orientation" program in which he was required to participate after his transfer to High Desert State Prison and other unspecified transfers justify equitable tolling. However, Petitioner's conclusory assertions allege no facts that would support a finding that either the orientation program or the prison transfers themselves adversely affected his ability to prepare a federal petition, and thus such events, which are routine within the California Department of Corrections, cannot support a conclusion that Petitioner encountered "extraordinary circumstances" beyond his control. See (Beeler), 128 F.3d at 1288.

Moreover, as mentioned, equitable tolling applies only where a prisoner has diligently pursued claims, but has in some "extraordinary way" been prevented from asserting his rights. Thus, in addition to considering whether circumstances prevented Petitioner in some extraordinary way from timely filing his petition, the Court must also consider Petitioner's diligence in pursuing his claims. Petitioner himself, in his Opposition to the Motion to Dismiss, does not dispute the existence of the extensive delays discussed above, but instead claims they are due not to a lack of diligence but to a combination of circumstances involving prison lock-downs, transfers between prisons, and the pendency of his various habeas corpus petitions in state and federal court.

Ultimately, however Petitioner provides no acceptable explanations for why he waited over two years from the date his conviction became final to file his first state post-conviction habeas

petition. Nor has Petitioner provided an acceptable explanation for why he waited yet another fifteen months after that state petition was denied before filing the instant petition. All of the grounds raised in the instant petition were known to Petitioner when the California Supreme Court denied his habeas petition. No additional research or analysis was required to complete the habeas corpus form and file it with the Clerk of the Court. The only possible finding the Court can make under these circumstances is that Petitioner was dilatory. Thus, the Court concludes that Petitioner has not shown due diligence. Accordingly, for this additional reason, he is not entitled to equitable tolling. See Espinoza-Matthews, 432 F.3d at 1026, n. 5.

Because Petitioner is not entitled to either statutory or equitable tolling, the instant petition is not timely under AEDPA and thus should be dismissed with prejudice.

RECOMMENDATION

Accordingly, the Court HEREBY RECOMMENDS that Respondent's Motion to Dismiss (Doc. 12), be GRANTED and the amended habeas corpus petition (Doc. 8), be DISMISSED for Petitioner's failure to comply with 28 U.S.C. § 2244(d)'s one-year limitation period.

This Report and Recommendation is submitted to the Honorable Anthony W. Ishii, the United States District Court Judge assigned to this case, pursuant to the provisions of 28 U.S.C. section 636 (b)(1)(B) and Rule 72-304 of the Local Rules of Practice for the United States District Court, Eastern District of California. Within fifteen (15) days after being served with a copy, any party may file written objections with the court and serve a copy on all parties. Such a document should be captioned "Objections to Magistrate Judge's Report and Recommendation." Replies to the objections shall be served and filed within five (5) court days (plus three days if served by mail) after service of the objections. The Court will then review the Magistrate Judge's ruling pursuant to 28 U.S.C. § 636 (b)(1)(C). The parties are advised that failure to file objections within the specified

time may waive the right to appeal the District Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

IT IS SO ORDERED.

Dated: **August 25, 2006** **/s/ Theresa A. Goldner**
j6eb3d UNITED STATES MAGISTRATE JUDGE